



March 6, 2000

Via Hand Delivery

The Board of Governors of the Federal Reserve System
20th and C Streets, N.W.
Washington, D.C. 20551
Attn.: Jennifer J. Johnson, Secretary

RE: Docket No. 5-1058, Gramm-Leach-Bliley Act Privacy Regulations
Request for Clarification of Terms

Dear Governors:

The Electronic Financial Services Council, which represents companies that deliver financial services over the Internet, is seeking to comment on the proposed regulations implementing the privacy provisions of the Gramm-Leach-Bliley Act (the "Act"), Pub. L. 106-102, Title V, Subtitle A. As you know, federal financial regulators, including the Board of Governors of the Federal Reserve System ("Federal Reserve"), and the Federal Trade Commission ("FTC") have in recent weeks issued proposed regulations implementing the Act.

It is important for providers of financial services to establish clear, effective and legally compliant privacy protections for consumers. However, companies which will be subject to the proposed regulations are severely handicapped in understanding or commenting on the agencies' proposals so long as it is not clear to whom the proposed regulations will apply. Many businesses that would want to comment on privacy issues affecting them do not realize that these proposed regulations are in fact intended to apply to them. In order for the notice and comment process on the proposed regulations to be meaningful, we believe that the Federal Reserve should more clearly and specifically articulate the meaning of the terms that define the applicability of the regulations -- "financial institution" and "financial product or service" -- before the close of the comment period.

Uncertainty Caused by Vague and Ambiguous Definitions

The proposed regulations apply to "financial institutions" offering "financial products or services." The proposed regulations define a financial institution as "any institution the business

of which is engaging in activities that are financial in nature or incidental to such financial activities as described in section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)).” Proposed 12 C.F.R. 216.3(j)(1). The proposed regulations define a financial product or service as “any product or service that a financial holding company could offer by engaging in an activity that is financial in nature or incidental to such a financial activity under section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)).” Proposed 12 C.F.R. 216.3(k)(1).¹ The cited Section 4(k) of the Bank Holding Company Act, however, merely permits a financial holding company to engage in any activity that:

the [Federal Reserve] Board determines ... (by regulation or order) (A) to be financial in nature or incidental to such financial activity; or (B) is complementary to a financial activity and does not pose a substantial risk to the safety or soundness of depository institutions or the financial system generally[.]

12 U.S.C. 1843k(k)(1). Section 4(k) does, it is true, specify certain activities that are “financial in nature.” See 12 U.S.C. 1843k(k)(4). These “specified” activities, however, include:

any activity that the Board has determined, by order or regulation that is in effect on the date of the enactment of the Gramm-Leach-Bliley Act, to be so closely related to banking or managing or controlling banks as to be a proper incident thereto (subject to the same terms and conditions contained in such order or regulation, unless modified by the Board).

12 U.S.C. 1843k(k)(4)(F). The scope of the proposed regulations therefore depends not only upon the reach of a category that has yet to be defined, but also upon a series of prior Federal Reserve determinations which have not yet been brought together in one place for the purpose of notifying parties who may be affected by the regulations. As a result, the proposed regulations’ simple reference to section 4(k) of the Bank Holding Company Act fails to provide notice to potentially affected parties. Its main effect is to suggest that more things are financial products or services, more institutions are financial institutions, and the proposed regulations apply more broadly than one would expect.

Potential Scope of the Ambiguity

¹ We note that proposed regulations issued by the Federal Trade Commission are identical, with the exception that they do not include the words “or incidental to such financial activities” and “incidental to such a financial activity” in the corresponding definitions. Proposed § 313.3(j)(1), (k)(1).

An example might help to show the potential scope of this ambiguity. Among the activities the Federal Reserve has determined to be “so closely related to banking or managing or controlling banks as to be a proper incident thereto” is:

Providing data processing and data transmission services, facilities (including data processing and data transmission hardware, software, documentation, or operating personnel), data bases, advice, and access to such services, facilities, or data bases by any technological means, if—

- (A) the data to be processed or furnished are financial, banking, or economic; and
- (B) The hardware provided in connection therewith is offered only in conjunction with software designed and marketed for the processing and transmission of financial, banking, or economic data, and where the general purpose hardware does not constitute more than 30 percent of the cost of any packaged offering.

12 C.F.R. 225.28(a), (b)(14). Does this mean that a software vendor, or an Internet portal, would be considered a financial institution for purposes of the Act?² We believe that very few companies undertaking these activities are aware that they may be subject to the proposed regulations. The agencies will therefore not have the benefit of these companies’ comments on the proposed regulations.

When it enacted the Administrative Procedures Act (“APA”), 5 U.S.C. 551 *et. seq.*, Congress emphasized the importance of providing notice to all parties affected by a proposed regulation, in order to obtain meaningful comments, and to allow such parties to express their legitimate interests and concerns:

² We note that the Office of the Comptroller of the Currency (“OCC”) has already determined that a number of activities not generally associated with financial services may be “part of or incidental to the business of banking,” including hosting commercial web sites, registering merchants with search engines, obtaining URLs, providing electronic communications pathways for product ordering and payment, providing merchants with software that will enable them to design their websites, providing links to third party vendors’ websites, and building web sites for merchants as part of an Internet merchant hosting service package. OCC Interpretive Letter No. 875 (October 31, 1999); OCC Interpretive Letter No. 856 (March 6, 1999); OCC Conditional Approval No. 304 (March 5, 1999); OCC Corporate Decision No. 97-60 (July 1, 1997). While these rulings are not binding on the Federal Reserve, they suggest how broadly a reasonable person might think the Federal Reserve could interpret its own regulations.

Agency notice must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto.

Sen. Doc. No. 248, 79th Cong. 2d Sess. 200 (1946). A more explicit definition of the scope of the proposed regulations would be more consistent with the intent of Congress in passing the APA.

Guidance Needed from the Federal Reserve

It would appear that, among the agencies proposing privacy regulations, the Federal Reserve is the appropriate agency to provide specificity regarding what businesses will be affected by the regulations. While a number of federal agencies must propose privacy regulations, only the Federal Reserve can define what constitutes an activity “financial in nature,” and thereby define the scope of those privacy regulations. We believe that, in order to comply with the spirit of the APA and the “plain language” provision in Section 722 of the Gramm-Leach-Bliley Act, the Federal Reserve must provide a clearer definition of the entities subject to the proposed regulations before permitting the comment period on those proposed regulations to close.

Companies that, unbeknownst to themselves, have become subject to privacy regulations about which they had no notice and no opportunity to comment may be unable to comply. Even companies which are aware that aspects of their activities may be subject to the proposed regulations, will be severely handicapped in commenting on or complying with the regulations unless they have a more specific statement of which aspects of their activities are contemplated to fall within the scope of the regulations’ requirements. As you can appreciate, leaving such matters to speculation makes meaningful comment almost impossible.

Members of the Electronic Financial Services Council strongly support implementation of effective privacy regulations. Our members are universally committed to protecting the privacy of consumer financial information. But we believe that the most effective method of protecting consumer privacy, and the method intended by Congress in passing the Gramm-Leach-Bliley Act, is to identify clearly what new obligations apply and the businesses to which those obligations apply. At a minimum, the Federal Reserve can provide specific guidance as to what constitutes an activity permitted for a bank holding company prior to the enactment of the Act. It could also provide clear standards for determining what new activities will be permitted under the Act as activities “financial in nature.” If it is unclear whether a category of activities is or is not covered, the Federal Reserve and the other agencies proposing regulations may wish to specifically exclude such categories of activity from the scope of the Act until clear guidance can be provided. This would help to establish what institutions are “financial institutions,” what products and services are “financial products and services,” and therefore what companies are covered by the proposed privacy regulations. If the Board deems it appropriate, we would

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appreciate the opportunity to have an on-the-record meeting with your staff to discuss ways in which the issues in this letter can be addressed.

Yours sincerely,

Jeremiah S. Buckley
For the Electronic Financial Services Council

cc: Virgil Mattingly, Esq.
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